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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 203

WOLFGANG, Prince of Hesse, and MARGARETHE, Landgrafen of Hesse, *Petitioners,*

v.

JOHN G. BURROWS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOSEPH S. ROBINSON,
DAYTON M. HARRINGTON,
JAMES D. GRAHAM, JR.,
Attorneys for Petitioners.

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justice of the Supreme Court of the United States:

The petitioners, Wolfgang, Prince of Hesse, and Margarethe, Landgrafen of Hesse, respectfully pray that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the District of Columbia Circuit, dated April 17, 1950, which affirmed a judgment of the United States District Court for the Dis-

trict of Columbia, dated June 6, 1949, directing that certain property be delivered to respondent.

OPINIONS BELOW.

The District Court ruled that respondent, who obtained the property (an old mine-cut diamond) from a convicted thief, Jack W. Durant, was the owner thereof because he had possession for a short period of time prior to surrendering it to the military authorities; and that the burden of proof was on defendants, petitioners herein, to show that the thief, Durant, and respondent, Burrows, who took from him, did not have title. (R. 40A-41A)

The Court of Appeals held substantially to the same effect and stated in its opinion that "we would be less than candid if we did not admit that there is ground for a strong suspicion that this diamond does belong to the appellants," petitioners herein.

JURISDICTIONAL STATEMENT.

The jurisdiction of this court is invoked under Section 1254 of the Judicial Code, as amended by the Act of June 25, 1948, C. 646, 62 Stat. 928. (Title 28, U.S.C. 1254.)

STATEMENT OF FACTS AND MATTERS INVOLVED.

Wolfgang, Prince of Hesse, and Margarethe, Landgrafen of Hesse, petitioners herein, are German nationals. Over one million dollars worth of jewels, including a large quantity of diamonds of a character similar to the one in question, was stolen from them by Colonel Jack W. Durant and other Army officers during the early days of the occupation. (R. 10A-11A; 27A-29A). Durant was convicted by General Courts-Martial of stealing the so-called "Hesse Jewels" from Kromberg Castle in Frankfurt, Germany; of wrongfully transporting and bringing the said jewels into the United States in the early part of 1946 and of other

charges in connection therewith. He was sentenced to serve fourteen years in the penitentiary.

When Durant returned to the United States after the commission of the crime, he contacted Mr. John S. Burrows, respondent, and "sold" to him the diamond valued at $2,600.00 for $500.00. The circumstances surrounding the "sale" were such as to indicate that Burrows was not a bona fide purchaser for value, without notice of the shady character of Durant's title. What happened is best described in Burrows' testimony before the General Court Martial. (R. 12A-17A).

The Trial Justice said, "I myself think it is a strange thing to buy a valuable piece of jewelry from a soldier returning from abroad, without investigating where the soldier obtained the piece of jewelry and without asking him to show a Bill of Sale," (R. 32A), and further, "The Court has a very strong suspicion that this is one of the stolen jewels. . . ." (R. 40A).

The trial of Durant for the theft of the "Hesse Jewels" received considerable publicity in the press and respondent, apparently feeling that he would be involved, voluntarily went to the Provost Marshall's Office and returned the jewel. (R. 17A). He wrote off the alleged purchase price, i.e., $500.00, from his income tax. (R. 18A). Burrows testified against Durant and the diamond itself was introduced in evidence in the Court Martial trial of Colonel Durant. (R. 11A).

At the conclusion of the Court-Martial, respondent instituted an action against the military officials for a mandatory injunction to secure return of the diamond, alleging that he was the owner and entitled to possession. (R. 4A).

The answer of the military officials denied that Burrows was the owner or entitled to possession and averred that the diamond was the property of petitioners herein, stolen from Kromberg Castle and illegally brought into the United States by Colonel Jack W. Durant.

On April 23, 1948, an order was entered by the District Court authorizing petitioners to appear "and defend against the claim of the Plaintiff for the possession of said diamond". (R. 8A). Petitioners appeared and answered on May 6, 1948. Appeal was taken by Burrows from said order which was affirmed. The affirmative defenses interposed by petitioners alleged ownership in themselves and the facts relating to the theft and ultimate receipt of the stolen property by Burrows.

Upon the trial, the testimony of respondent before the Court Martial and a stipulation of counsel were introduced. (R. 10A-39A). Counsel for respondent Burrows, himself, pointed out that this was not the usual case of interpleader (R. 23A) where either party may recover only on the strength of his own title. In this case, because of the enemy alien status of petitioners and the provisions of the Trading With the Enemy Act, the limited right of petitioners to intervene was only to the extent of permitting them to defend against the claim of plaintiff. The Trial Justice ruled, nevertheless, that the burden of proof was upon petitioners to show affirmatively that Durant, the thief, and Burrows, the recipient of the property from said thief, did not have title and that petitioners would be entitled to judgment "only if they established their right on the strength of their own title." (R. 40A-41A).

The Trial Justice, on several occasions, said that because of the technicalities involved, he felt that he was helping to perpetrate a miscarriage of justice. (R. 35A; 37A).

It is the contention of petitioners that, had the rules of law as laid down by this Honorable Court and as recognized generally by all State and Federal Courts of the United States been followed, there would have been no miscarriage of justice; that judgment would have gone in favor of petitioners even though by reason of the Trading With the Enemy Act they may not have been entitled to the immediate return of their property. (*Birge-Forbes Co.* v. *Heye*, 251 U. S. 317, 323).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. There is a conflict of decisions between the Court of Appeals for the District of Columbia Circuit and the Courts of Appeals for the several other circuits.

2. The Court below erred in applying certain principles of law to the facts in this case and in not applying certain controlling applicable rules.

3. Errors were committed by the Courts below, involving the application, interpretation and construction of legal principles, which if permitted to remain unchallenged, may cause confusion in the law respecting rights of property and burden of proof.

Prayer for the Writ.

For the reasons hereinabove stated and those stated in the brief in support of this petition, it is respectfully prayed that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the District of Columbia Circuit, commanding that Court to certify and send to this Court a complete transcript of record and all proceedings in the instant case so that the cause may be reviewed and determined by this Honorable Court and the judgment of the Court below reversed; and petitioners respectfully pray that they be granted such other further and equitable relief as this Court may deem just and proper.

JOSEPH S. ROBINSON,
DAYTON M. HARRINGTON,
JAMES D. GRAHAM, JR.,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. The Burden of Proof Was Upon Respondent to Estabish Title in Himself and Not Upon Petitioners to Show the Contrary.

It is an elementary rule of law that he who asserts title to real or personal property or the right to possession of property has the burden of proving such fact.

Meyer v. *Ritter,* 268 F. 937.
Ransom v. *Williams,* 69 U. S. 313.
Smith v. *Orton,* 131 U. S. LXXV, App.
N. J. Zinc Co. v. *Singmaster,* 4 F. Supp. 967, 982-3.
Moore v. *Sawyer,* 167 F. 826.
Goerz v. *Barstow,* 148 F. 562.

Such proof may consist of showing: 1. That he was a bona fide purchaser for value without notice; 2. That his assignor had title or; 3. That he has title by reason of a legal presumption arising from present possession and the attending circumstances. If sufficient, the burden of going forward shifts to the other side. In this case, as is hereinafter demonstrated, respondent failed to bring himself within any of these rules of law.

In *Meyer* v. *Ritter, supra,* the Court of Appeals for the 8th Circuit at Page 942 said: "The defense of innocent purchaser in an affirmative defense. The burden of proof is upon the party setting up the defense. *Boon* v. *Chiles,* 10 Pet. 177, 9 L. Ed. 388; *Wright Blodgett Co.* v. *U. S.,* 236 U. S. 397, 405, 35 Sup. Ct. 339, 59 L. Ed. 637; *Stonebraker-Zea Cattle Co.* v. *U. S.,* 220 Fed. 99, 135 C. C. A. 96; *U. S.* v. *Krueger,* 228 Fed. 97, 142 C. C. A. 503."

The circumstances, as disclosed by the record under which the alleged "sale" to Burrows took place, compel the conclusion that Burrows was not a bona fide purchaser for value without notice and in any event he did not predicate his cause of action on such claim.

Mercantile Trust Co. v. *Chicago, P. & St. L. Ry. Co., et al.*, 123 F. 393.
Southwestern Pipe v. *Empire*, 33 F. (2nd) 248.
Lakin v. *Sierra*, 25 F. 337.

Both Courts below concluded that the circumstances surrounding the transaction, as appears from the record (R. 10A-41A), gave rise to the "strong suspicion" that the diamond in question was one of the stolen jewels. (R. 40A). The circumstances appearing "suspicious," the duty of investigation was upon Burrows. That duty was cast upon him by law. (*Walbrun* v. *Babbitt*, 83 U. S. 577.) That duty he failed to perform and accordingly he cannot fall within the classification of a bona fide purchaser for value without notice. (*U. S.* v. *Barnard*, 72 F. Supp. 531; *Newton* v. *Porter*, 69 N. Y. 133; and cases cited above.)

Of course, Burrows could recover if he were able to establish title in Durant, even though he were not a bona fide purchaser for value. (*Mitchell* v. *Hawley*, 83 U. S. 544, 550.) There was not, however, even the remotest suggestion or attempt to establish that Durant, the thief, had legal title and unless Burrows were a bona fide purchaser, without notice, could get no better title than Durant had.

Shaw v. *Merchants National Bank*, 101 U. S. 557.
Southern Pacific Co. v. *Bank of America*, 23 F. (2nd) 939.
Mitchell v. *Hawley*, 83 U. S. 544, 550.

Burrows, therefore, of necessity, predicated his right of recovery on the ground that he at one time had possession and that by reason of such possession the law presumed ownership in him. The presumption, which has always been regarded as extremely slight, has never, as far as we have been able to ascertain, extended to a case involving past possession obtained under suspicious circumstances and then voluntarily surrendered. The presumption is applicable only in a case of actual, present, physical possession. (Wigmore on Evidence, 3rd Ed. Vol. IX, Sec. 2515.)

The circumstances under which the possession was obtained and the circumstances attending the possession are always material in determining whether the presumption of ownership shall apply. (*Bergen* v. *Riggs,* 34 Ill. 170.)

It follows that even if there were the slight presumption of ownership in Burrows by reason of past possession, same was negatived by circumstances under which he came into possession and the circumstances attending his possession thereafter. The record indicates that: 1. The price was wholly inadequate; 2. No bill of sale was given or requested; 3. Durant and Burrows were strangers; 4. Durant was in the uniform of an Army Officer and not in the jewelry business; 5. Durant offered Burrows other diamonds as a bonus for a new car; 6. Burrows voluntarily surrendered the diamond—a case of the "Wicked fleeth when no man pursueth;" 7. Burrows wrote off the cost from his income tax, indicating that he did not believe himself to be the owner.

These facts, on their face, plus the fact that the diamond was obtained from a convicted thief, destroy the slight presumption of ownership, if any there was by reason of past possession. It is not *any* possession, past or present, which gives rise to that slight presumption of ownership. Were the rule otherwise and as held by the lower Courts, then even Durant, the thief, may claim ownership on the basis of his past possession, unless the members of the Hesse Family could positively identify each of the numerous stones which were stolen from them. Were Mr. Forrestal and the other originally named defendants under a like burden to prevent recovery by Burrows in this case? Certainly it could not reasonably be contended that Mr. Forrestal had the burden of disproving Burrows' claim of ownership. Upon what theory then was that burden cast, upon the substituted defendants who stepped into Mr. Forrestal's place and who could not, by reason of the Trading With the Enemy Act, obtain possession for themselves? On the record, Burrows' petition should have been dis-

missed regardless of defendant's right of recovery. Burrows' case must be decided on proof adduced by himself and on its own merits and not on the basis of defendant's rights to the property.

The Courts below seem to have departed from the well recognized rule that the burden of proof is on the person who seeks to enforce a claimed right and not upon the person who opposes that right. (*Acker* v. *Schulte*, 74 F. Supp. 683.) In the *Acker* case at page 689, the Court said: "The burden is not upon the person who opposes the right to show that the other is not entitled to it. *Henry H. Cross* v. *Simmonds*, 96 F. (2nd) 482, 486." See also: *Burgess* v. *Reliance Life Ins. Co.*, 112 F. (2nd) 234; *Ransom* v. *Williams*, 69 U. S. 313.

Under the order bringing petitioners into this case, petitioners were not required to go forward and establish title in themselves. They were permitted to defend only against Burrows' claim of title. Burrows offered no proof of title and relied solely upon an alleged presumption. The only inferences to be drawn from the evidence negative that presumption, if any there was, and accordingly the petition should have been dismissed.

The theft of property which cannot be positively identified by the owner does not grant immunity in the thief or create property rights in the recipient of such property. The classic example is the theft of grain, currency, negotiable securities or other property which bears no peculiar marks of identification. (*Newton* v. *Porter*, 69 N. Y. 133.) Does the thief or the recipient of stolen property become the owner because the true owner cannot or fails to identify each grain or each dollar bill? Such identification is in most cases an impossible task. Identification need be made only on the basis of similarity as was done here, which, taken together with all the circumstances, becomes adequate proof of ownership.

The effect of the ruling of the Court below is to vest property rights in a thief or his assignee because the true

owner does not or cannot positively identify each item as his property. Such a ruling is contrary to the generally accepted rules in all the State and Federal Courts of the United States and, in this case, resulted in a miscarriage of justice.

II. The Courts Below Erred in Excluding from Evidence the Record of Durant's Conviction.

While there is a difference of opinion in the Courts as to whether or not conviction in a criminal case can be introduced in evidence to prove the truth of the facts upon which it is rendered, there is no difference of opinion that such conviction is admissible in evidence to establish the fact that it was rendered.

Burt v. *Union Cent. Life Ins. Co.*, 105 F. 419, Aff. 187 U. S. 362
Debs v. *U. S.*, 249 U. S. 211
Austin v. *U. S.*, 125 F. (2nd) 816
Schindler v. *Royal Ins. Co.*, 258 N. Y. 310

The exclusion of the record of conviction which was material and, as now appears, vital to petitioners' case, constitutes substantial error and warrants reversal of the judgment.

PETITIONERS RESPECTFULLY PRAY THAT THE WRIT OF CERTIORARI HEREIN REQUESTED BE GRANTED.

Respectfully submitted,

JOSEPH S. ROBINSON,
DAYTON M. HARRINGTON,
JAMES D. GRAHAM, JR.,
Attorneys for Petitioners.

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JOHN S. BURROWS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion District Court ruled that respondent, a purchaser from Durant, a person in possession, without notice of any irregularity in Durant's title, had proven a rebuttal presumption of title. This presumption shifted to the Petitioners the burden of showing that Durant did

not have title. The petitioners failed to establish any title in themselves. (R40A-41A)

The Court of Appeals in affirming the judgment of the District Court stated in speaking of Petitioner's case. "In short their amounts to this proposition: We had some diamonds. These diamonds were stolen from us by Durant. Ergo, all diamonds that Durant had are ours, and this particular one must belong to us———But the presumption of ownership was in favor of the Appellee, and we cannot allow presumptions to be overturned by suspicion. They must be countervailed by substantial evidence." The opinion of the Court of Appeals is reported in 181 F. 2nd 630. (R43-44).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether burden of going forward with the evidence shifts after plaintiff has established prima facie case.

Whether judgment of conviction in a criminal case is admissible in a civil case to establish the truth of the facts on which it was rendered.

STATEMENT OF FACTS

Mr. Burrows was approached by Durant who offered to trade three small diamonds on the purchase of an automobile. Mr. Burrows refused, but wanting to buy a diamond for his wife, told Durant that he would be interested in purchasing a large diamond. Durant told Mr. Burrows he had a large diamond that he, Durant, had bought for his wife. Mr. Burrows told him to bring the diamond around and he would purchase it at the

appraised value. Mr. Burrows went to the City Bank and talked with Major Pyles, Vice President of the bank, about purchasing the diamond from Durant. (R13A) As a result of his conversation with Major Pyles, Burrows and Durant went to a jeweler who appraised the diamond for $600.00, and Mr. Burrows purchased the diamond for $500.00 or $525.00. (R15A).

Several days later Mr. Burrows read in the newspapers about Durant's arrest. He again went to Major Pyles for advice and as a result went to the Army authorities and told them of his purchase of this diamond from Durant. At the request of the Government agents he turned the diamond over to them. (R17A)

The Trial Judge, in his opinion, stated: "Gentlemen, I have read the material that you submitted overnight, including the testimony given by Mr. Burrows at the court-martial trial.

"The principles of substantive law governing the disposition of this matter are not in dispute. Burrows obtained the diamond from Durant. Possession gives rise to presumption of title until this presumption is rebutted. The presumption is not too heavy a one. Nevertheless, it is sufficient to shift at least the burden of going forward with the evidence. Durant had possession of the diamond when it was acquired by Burrows. Therefore, anyone who claims that Durant did not have title has the burden of showing that fact and establishing that contention."

"There is no proof before the Court that the Prince of Hesse ever had title to the specific diamond involved in this action. There is not even any proof that this specific diamond was in the box of jewels which Durant was charged with stealing. The Court has a very strong suspicion that this is one of the stolen jewels, but suspicion cannot take the place of proof. I repeat that there is no proof whatsoever that this particular jewel was ever the property of the Prince of Hesse or of the

Landgrafin of Hesse. The burden of proof is on the Prince of Hesse and the Landgrafin of Hesse to establish this fact. The Court realizes that it would be very difficult, probably, for the Prince of Hesse and the Landgrafin of Hesse to identify any specific diamond as having been one of the diamonds in the stolen box. Nevertheless, they cannot establish title to this Jewel without proving this fact."

"So far as Burrows was concerned, he purchased the diamond from a person who was then a Colonel in the United States Army. There was nothing to put him on notice that title to the diamond was derived improperly. One does not ordinarily think of a Colonel in the United States Army as being a thief. It is a matter of common knowledge that many members of the armed forces lawfully acquired by purchase all sorts of keepsakes while they were overseas, frequently at low cost. Therefore the Court does not find that there was anything to put Burrows on notice of any irregularity in Durant's title. But irrespective of this circumstance, the interpleading defendants may recover only if they establish their right on the strength of their own title. They have not established any title.

ARGUMENT

I.

That There Is No Conflict Between the Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Several Other Circuits As to the Shifting of the Burden of Going Forward With the Evidence After Prima Facie Proof of Ownership.

The facts of the case clearly show that Respondent was a purchaser for value without notice.

Durant aproached Burrows first with the offer to sell three small diamonds. Burrows informed him that he was interested in a larger stone. Durant told him that

he had one he had purchased for his wife that he would sell to Burrows. Burrows went to talk with J. C. Pyles, a Vice President of the City Bank and a former Army Major, about purchasing the diamond. That as a result of this conversation he went with Colonel Durant to Max Zweig, a jeweler, who appraised the diamond for $600.00 and that Burrows offered Durant $500.00 for it. That Burrows purchased the diamond the next day.

This evidence raised, at least, a legal presumption of ownership Burrows.

The law is well settled as to this point.
In Abbott on Facts, page 1174, it is stated:

> "Where ownership is directly involved, evidence of sale and delivery to the alleged owner by one who was in possession raises a legal presumption of ownership, (Holbrook vs. N. J. Zinc Company, 57 N. Y. 616; McKeage vs. Hanover F. Ins. Co., 81 N. Y. 38, 37 (Am. Rep.) 471), in the absence of anything to impair the presumption of the seller's ownership, or power to sell, arising from his possession. Atkins vs. Hosley, 3 Thomp. & Co. (N. Y.) 322."

Possession is "prima facie" evidence of ownership.

Kurrle vs. *Helvering,* 126 Fed. (2) 723.
Gerlach-Barklow Co. vs *.Morris & Bendien,* 23 Fed. (2d) 159.
Melby vs. *United States,* 28 Fed. (2) 613.

In *Maryland Credit Finance Corporation* vs. *Campbell,* Supreme Court of Delaware, 195 At. at page 285:

> "The first evidence of ownership of personal property is possession. If a person is in possession of personal property, holding himself out to others as the owner and acting as the owner, the presumption of the law is that he is the owner."

In *Long* vs. *Rasmussen,* 281 Fed. 236.

> "Plaintiff alleges she owns and is entitled to possession of certain property distrained by default collection of Internal Revenue for taxes assessed against one Wise she seeks to enjoin threatened sale and recover possession. Evidence on her behalf is that the property is the furnishings of a resort, or hotel, conducted by her and was in her possession when distrained by defendant. This is proof of ownership and right of possession, and imposes on defendant the burden to justify the seizure by a preponderance of the evidence that Wise owns the property."

In Wigmore On Evidence, Vol. 9, Sec. 2515, at page 425, it is stated as follows:

> "Where title to land becomes material, the fact of present possession alone may serve to create a presumption of ownership . . . and the rule serving merely to shift to the opponent the second burden, or duty of producing some evidence to the contrary.
>
> The same rule serves in the evidencing of ownership of personalty, particularly in cases of larceny or robbery when a real dispute of ownership is rare."

So, by the foregoing authorities, it is seen that Burrows established prima facie ownership of the diamond and that the burden then was on the Petitioners to introduce evidence to rebut this legal presumption of title.

Stone vs. *Stone,* 78 U. S. App. D. C. 5, 7, 136 Fed. (2d) 761, 763.

The Petitioners failed to establish any facts to support the presumptions upon which they attempt to base their case.

Presumptions must be based upon established fact.

Weaver vs. *Baltimore & O. R. Co.,* 3 App. D. C. 436.
United States vs. *Mammoth Oil Co.,* 14 Fed. (2d) 705.
Brady vs. *United States,* 24 Fed. (2d) 399.
General Reinsurance Corp. vs. *Southern Surety Co.,* 27 Fed. (2d) 265.

II.

The Court Below Properly Did Not Consider the Evidence the Record of Durant's Conviction.

The rule is that a judgment of conviction in a criminal case cannot be given in evidence in a purely civil action, to establish the truth of the facts on which it was rendered.

Chamberlain vs. *Pierson,* 87 Fed. on page 420.

And in *Countryman* vs. *United States,* 21 Court of Claims 474, on the trial of case where the claimant contracting with one Frost, an Indian Agent presented a voucher for 150 tons of hay which he claimed to have delivered to the Crow Indian Agency. The Government claiming he had delivered but 80 tons, attempted to impeach prima facie evidence of indebtedness by the record of a criminal trial in which the agent Frost was defendant, the Court said on page 475:

> "Frost was indicted for fraud in issuing the voucher now here produced and the jury had necessarily to consider whether the hay had been delivered as alleged, but we know of no rule by which, even under these circumstances, the claimant, an absolute stranger to the trial, can now have the testimony, there taken, used against him here in a different proceedings."

In *Chantongco* vs. *Abaroa,* 218 U. S. 476, the court held on page 481, that

> "The General Rule of the Common is that a judgment in a criminal proceedings cannot be read in evidence in a civil action to establish any fact there determined.".

The fact of the conviction of Durant for a crime, not relevant to the issues in this case, were properly excluded as being immaterial and irrelevant.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES F. MCKAY, JR.,
Counsel for Respondent.